UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TED A. OFF,

Plaintiff,

v.

UNITED STATES GOVERNMENTS, et al.,

Defendants.

Case No. 2:09-CV-01525-KJD-LRL

ORDER

Currently before the Court is Plaintiff's Motion for Summary Judgment (#6). Defendants (referred to herein as the "Government") filed a Response in Opposition (#7), to which Plaintiff filed a Reply (#8). Also before the Court is Defendants' Motion to Dismiss (#10). Plaintiff filed a Response in Opposition (#13), to which the Government filed a Reply (#4). Additionally listed as a pending Motion on the Court's docket, is Plaintiff's Motion to Set for Hearing (#12). Defendants filed a Response (#17). The Court has considered each of the Motions, together with their respective Responses and Replies, and issues it ruling on each Motion, jointly herein.

I. Background

On an unspecified date, Plaintiff became a full-time employee with the Colorado Army National Guard ("COARNG"). In May 1994, Plaintiff was in an automobile accident with a "subsequent neck dislocation C6 & C7 vertebrae," and in June 1994, underwent surgery for said injury. On November 9, 1995, while still employed with the Army, Plaintiff received notice of his tentative employment with the United States Postal Service in Aurora, Colorado (Id.) The next day, Plaintiff verbally notified his superiors at the COARNG and the Colorado Army Aviation Support Facility ("COAASF") of his employment with the United States Postal Service ("USPS") and gave his "tentative resignation." (Id.) On January 22, 1996, Plaintiff underwent a physical with the

USPS, and in March 1996, submitted a written resignation to the COARNG. (Id. at 5.) Plaintiff's employment with the COARNG ended on March 29, 1996. Plaintiff alleges he began his employment with the USPS on March 29, 1996. On June 22, 1996, Plaintiff was fired from the USPS for, *inter alia,* not revealing his prior physical injury on his employment application. (Id.)

In November 1998, Plaintiff filed two lawsuits in the Federal District Court of Colorado related to what he alleged to be his "wrongful termination". The first lawsuit was filed against the United States Federal Government, United States Department of the Army, COARNG, COAASF, Maj. Wardall, Michael Uknavage, and John Regan ("first lawsuit"). Ted Allen Off v. U.S. Federal Government, Case No. 1:98-cv-02470-EWN (D. Colo. 1998). Plaintiff's first lawsuit brought a claim of wrongful discharge against the Army, COARNG, and COAASF related to the 1996 termination of his employment with the Army, COARNG, and COAASF. (See #10 Ex. C at ¶¶ 6–11.) In the first lawsuit, Plaintiff specifically averred that "the Defendants supplied a fraudulent document [an SF-50 Notification of Personnel Action] to the U.S. Postal Service stating that the plaintiff was fired from employment. . . ." (Id. at ¶ 10.) The District Court of Colorado entered an order on March 22, 1999, dismissing Plaintiff's complaint.

The second lawsuit was filed against the United States Federal Government, USPS, Denver Bulk Mail Center, David Medina, and Judith Ford ("second lawsuit"). Ted Allen Off v. U.S. Federal Government, Case No. 1:98-cv-02471-EWN (D. Colo. 1998). Plaintiff's second lawsuit brought a claim for wrongful discharge against the USPS for actions allegedly involving Plaintiff's failure to disclose his previous neck/back injury as well as the filing of an allegedly "fraudulent" SF-50. (See Ex. B at ¶¶ 6–10.) Additionally, as an exhibit to the second lawsuit, Plaintiff attached the SF-50 at issue in the case before this Court. (See #10 Ex. A.) As in the first lawsuit, the District Court of Colorado entered an order on March 22, 1999, dismissing Plaintiff's complaint.

Plaintiff filed his Complaint in the instant case on August 14, 2009, alleging seven causes of action against USPS, the United States Army[1], the United States Office of Personnel Management, Elaine Kaplan, and Charles D. Grimes III for (1) Falsification of U.S. Government Documents; (2) Wrongful Termination/Discharge (COAASF); (3) Wrongful Termination/Discharge (USPS); (4) Wrongful Termination/Discharge (CORNG); (5) Violation of Civil Rights Due Process; (6) Civil Habeas Corpus; and (7) Violations of the Fair Labor Standards Act ("FLSA"). Plaintiff seeks *inter alia* injunctive relief, compensatory and punitive damages, as well as "treble back pay, treble leave, treble retirements, treble time in grade, treble time in service, possible promotion to Senior General Grade, and benefits for military, civilian and postal service." (Compl. at 13.)

A. Plaintiff's Motion for Summary Judgment

Plaintiff's instant Motion for Summary Judgment (#6) seeks that the Court grant summary judgment and/or default judgment, alleging that the Defendants failed to file a responsive pleading. Plaintiff is mistaken however, as the Defendants had already sought and obtained an extension of time in which to respond to Plaintiff's Complaint. (See #5, granting Defendants extension through December 15, 2009 in which to file a responsive pleading). Accordingly, Plaintiff's Motion for Summary Judgment (#6) is denied as moot.

B. Defendants' Motion to Dismiss

Defendants' instant Motion to Dismiss seeks that the Court dismiss Plaintiff's action pursuant to Fed. R. Civ. P. 12(b)(1), (b)(6) and 8(a). Specifically, Defendants aver that Plaintiff's first claim for relief must be dismissed because it was brought after the two-year statute of limitations had expired for claims brought under the Privacy Act, and for lack of subject matter jurisdiction. Defendants additionally disclaim Plaintiff's second, third, and fourth causes of action under the doctrine of res judicata alleging that said causes of action were already raised in the first and second lawsuits. Defendants disclaim Plaintiff's fifth and sixth causes of action (for civil rights due process

[1]Defendants' Motion to Dismiss notes that "[i]n responding on behalf of the United States Army," the Motion is filed on behalf of the "Colorado Army National Guard, Colorado Army Aviation Support Facility." (#10 at n.1.)

and civil habeas corpus) alleging that Plaintiff has "not put forth sufficient factual content to allow" liability, and because Plaintiff is "not in custody." (#10 at 2.)

II. Standard of Law for Motion to Dismiss

Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the speculative level." Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949 (internal citation omitted).

In Iqbal, the Supreme Court recently clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the Court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. Id. at 1949. Second, the Court must consider whether the factual allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." Id. (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, plaintiff's complaint must be dismissed. Twombly, 550 U.S. at 570.

III. Analysis

(A) Falsification of U.S. Government Documents

Plaintiff's first claim is brought under the Privacy Act, alleging that "U.S. Government Documents" were falsified, (Compl. at 7) and that the SF-50 was "falsified and developed to render plaintiff unemployable with the U.S. Government." (Id.)

Defendants aver that Plaintiff's Privacy Act claim should be dismissed as to Defendants Elaine Kaplan ("Kaplan") and Charles D. Grimes ("Grimes") because "[a] civil action under the Privacy Act is properly filed against an "agency" only, and not against an individual, a government official, an employee, or the United States." (See #10 at 13)(citing 5 U.S.C. § 552a)g)(1). The Court agrees, and finds that Plaintiff's claims against Kaplan and Grimes should be dismissed as they are not proper defendants under the Privacy Act. See Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1340 (9th Cir. 1987).

Additionally, Defendants aver that Plaintiff's Privacy Act claim is barred by the two-year statute of limitations. The Court agrees. Title 5 U.S.C. § 552a(g)(5) provides in relevant part: "[a]n action to enforce any liability created under this section may be brought in the district court . . . within two years from the date on which the cause of action arises . . . ." A cause of action "arises" under 5 U.S.C. § 552a(g)(1)(C) when the plaintiff "knows or has reason to know of the alleged violation." Rose v. U.S., 905 F.2d 1257, 1259 (9th Cir. 1990). Because Plaintiff attached the SF-50 to at least one of the complaints he filed on November 12, 1998, Plaintiff knew or had reason to know of the allegedly incorrect SF-50 at that time. Accordingly, Plaintiff's current Privacy Act claims are untimely and must be dismissed.

Plaintiff's Privacy Act claims are also barred by the doctrine of res judicata because Plaintiff knew of the allegedly incorrect SF-50 at the time he filed his 1998 lawsuits, and the Privacy Act claims could have been brought as a part of his prior 1998 lawsuits alleging wrongful termination due to a "fraudulent document [sent] to the U.S. Postal Service stating that the plaintiff was fired

from employment and the Army Aviation Support Facility which subsequently cause (sic) the U.S. Postal Service to fire the Plaintiff." (See #10 Ex. B at ¶ 6.)

(B) Wrongful Termination/Discharge

As stated above, Defendants aver that Plaintiff's current claims for wrongful termination are barred by the doctrine of res judicata. "Res judicata, or claim preclusion, prohibits any lawsuits on any claims that were raised or could have been raised in a prior action." Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002) (citations and internal quote marks omitted). "Res judicata applies when the earlier suit (1) involved the same claim or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." Mpoyo v. Litton Electro-Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005) (citation omitted). In discussing the doctrine of res judicata, the Ninth Circuit has noted:

> The doctrine of res judicata provides that a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. The application of this doctrine is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction. Moreover, a rule precluding parties from the contestation of matters already fully and fairly litigated conserves judicial resources and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. The doctrine of res judicata is meant to protect parties against being harassed by repetitive actions.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003) (citations and internal quotation marks omitted). "When considering the preclusive effect of a federal court judgment, we apply the federal law of claim preclusion." First Pacific Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1128 (9th Cir. 2000) (citation omitted). A final federal court judgment on the merits bars a subsequent action between the same parties involving the same cause of action. Id.

In his two lawsuits filed in Colorado, Plaintiff alleged wrongful discharge against the Army and the USPS. Pursuant to the doctrine of res judicata, all of the claims that Plaintiff brought, or could have brought, as a part of his prior lawsuits are barred from being brought in the instant case. See Stewart, 297 F.3d at 956; Mpoyo, 430 F.3d at 987. In 1998 and here, Plaintiff's claims for

wrongful discharge are for the same allegedly falsified SF-50 and for Plaintiff's failure to disclose his pre-existing neck/back injury on his application for employment with the USPS. Accordingly, the Court finds that Plaintiff's claims are barred because the instant action involves the same wrongful discharge claims as were brought in the 1998 Colorado lawsuits, judgment was entered in said lawsuits in favor of Defendants, and the lawsuits involved the same parties or their privies.

(C) Violation of Civil Rights Dues Process

Defendants aver that Plaintiff's fifth claim for relief should also be dismissed because it fails to meet the pleading requirements set forth in Fed. R. Civ. P. 8(a). The Court agrees. As stated above, in Iqbal, the Supreme Court held that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged", and that "[n]aked assertions devoid of factual enhancement do not suffice. 129 S.Ct. 1937, 1949 (2009).

Plaintiff's fifth claim for relief alleges violations of his civil and due process rights, yet fails to name a single federal employee who acted in an individual capacity to deny Plaintiff an established constitutional right. Plaintiff's claim asserts only that a "[s]tatement by Defendant that Plaintiff was fire (sic) verbally to the USPS and Plaintiff was not allowed in any way to defend himself violates his civil rights of Due Process by denying Life, Liberty and Property, Employment is all three." (Compl. at 11.) These allegations lack sufficient factual content to allow the Court to draw the inference that any specific federal employee has violated Plaintiff's constitutional "civil rights" or "due process." Accordingly, Plaintiff's fifth claim for relief fails pursuant to Rule 8 and must be dismissed.

Defendants additionally aver that Plaintiff's fifth claim for relief is also insufficient to plead a claim under Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), and must be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) "because it does not fall within an established exception to or waiver of sovereign immunity." (#10 at 19.) The Court agrees.

As previously touched upon, Plaintiff's pleadings fail to identify any specific federal official acting in an individual capacity to deny Plaintiff a clearly established right under the Constitution. The Bivens remedy exists solely against federal officials, not against the United States or its agencies. See Kreines v. United States, 33 F.3d 1105, 1109 (9th Cir. 1994). Additionally, the statute of limitations on any Bivens action is governed by the forum state's personal injury statute. See Papa v. United States, 281 F.3d 1004, 1009 (9th Cir. 2002). N.R.S. § 11.190(4) provides for a two-year statute of limitations on personal injury claims. As stated above, Plaintiff's instant claim dates back to actions which allegedly took place in 1996, and any Bivens claim would had to have been filed within two years.

(D) Habeas Corpus

Defendants also aver that Plaintiff's sixth claim for relief citing 28 U.S.C. § 2254(e)(2)(B) must be dismissed as it is completely inapposite in the instant case because Plaintiff is not in custody.

Plaintiff's Response in Opposition argues that "Civil Habeas Corpus pertains to all other person (sic) not just ones incarcerated." (#13 at 3.) Plaintiff is incorrect. By its plain language, 28 U.S.C. § 2254(e) requires a "person to be in custody pursuant to the judgment of a state court" for Section 2254(e)(2)(B) to apply. Plaintiff is not in custody, and does not allege that he is in custody in his Complaint. As such, Plaintiff's claim must be dismissed for a lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

(E) Fair Labor Standards Act

Defendants also disclaim Plaintiff's seventh cause of action, arguing that the statute of limitations on a Fair Labor Standards Act claim is two years. (#10 at 21)(citing 29 U.S.C. § 255(a). The Court agrees.

Plaintiff's seventh claim for relief seeks pay dating back to the termination of his employment with the Army and USPS in 1996, and is untimely by more than a decade. Moreover, said claim for backpay could have been brought as part of Plaintiff's first and second lawsuits, as it is seeking pay allegedly owed from Plaintiff's past employment with the Army and USPS in 1996.

Plaintiff's employment with the Army ended in March 1996. (See Compl. at 5.) Plaintiff's employment with the USPS ended in June 1996. (Id.) Because Plaintiff did not bring his Fair Labor Standards Act claim against the Army by March 1998, all such claims are barred. Likewise, since Plaintiff failed to bring his claim against the USPS by June 1998, his Fair Labor Standards Act claim against the USPS is also barred.

IV. Conclusion

Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's Motion for Summary Judgment (#6) is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (#10) is **GRANTED**. Judgment to be entered on behalf of Defendants.

IT IS FURTHER ORDERED that Plaintiff's Motion to Set for Hearing (#12) is **DENIED**, as moot.

DATED this 27th day of September, 2010.

Kent J. Dawson
United States District Judge